85-729 (1)

Supreme Court, U.S.
FILED
OCT 28 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

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MARCELO RAMOS MOTTA,
Petitioner

v.

SAMUEL WEISER, INC.
Respondent

_____

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

_____

Daniel B. Stone
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Attorney for Petitioner

QUESTION PRESENTED

May a trial court decide a case on the merits on the basis of an issue never raised by the parties and on which no evidence was presented?

LIST OF PARTIES

Marcelo Ramos Motta and the Society Ordo Templi Orientis (SOTO) were plaintiffs in the district court, appellants in the Court of Appeals and are petitioners here. Samuel Weiser, Inc. was defendant in the district court and appellee in the Court of Appeals.

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QUESTIONS BELOW

The district court's opinion following a bench trial is reproduced in the Appendix at A-28. The First Circuit Cout of Appeals' affirmance of the district court's opinion is reproduced in the Appendix at A-2.

JURISDICTION

The opinion of the Court of Appeals was entered on July 29, 1985. The statutory provision conferring jurisdiction on this Court to review the decision by writ of certiorari is 28 U.S.C. § 1254(1).

STATUTES INVOLVED

None.

STATEMENT OF THE CASE

The suit below primarily

centered on the infringement of certain copyrights by defendant, a publisher. The copyrights were bequeathed to the Ordo Templi Orientis (OTO), a masonic fraternity, by the will of the author of the copyrighted materials, an English author known as Aleister Crowley. At the time of his death in 1947, Crowley was the supreme head of the OTO, which office is known as the Outer Head of the Order, or OHO. The OTO at that time was an unincorporated association.

Plaintiff Society Ordo Templi Orientis (SOTO) asserts that it is the incorporated successor to the OTO and therefore has all rights to OTO property, including its copyrights. Plaintiff Marcelo Motta claims to be the present head or OHO of the incorporated OTO. He claims the right to enforce the OTO copyrights both in his position as

the head of the OTO and also by virtue of his membership in the OTO.

Plaintiffs' basic claim was that defendant had published and distributed a number of works in which the OTO owned the copyrights without plaintiffs' permission.

Jurisdiction in federal district court was founded on diversity, plaintiff SOTO being a Tennessee corporation, plaintiff Motta being a Brasilian citizen, and defendant being a Maine corporation, and the amount in controversy was pleaded as being over $400,000. 28 U.S.C. § 1332. The copyright subject matter also gave jurisdiction under 28 U.S.C. § 1338.

Defendant contested the claims on the ground, inter alia, that the ownership of the copyrights belonged to another group claiming to be the true

successor to the OTO.

At trial defendant put on the testimony of Grady McMurtry who claims to be the head of the OTO and who has incorporated a corporation in California called Ordo Templi Orientis which claims to be the sole legitimate successor to the unincorporated OTO. In a related case in federal district court in San Francisco, Mr. Motta and SOTO are engaged in litigation with McMurtry and his version of the OTO over which is the legitimate OTO and which controls its copyrights and other property.

The trial court decided that Mr. Motta had failed to prove that he was the head of the OTO. It then turned to his right to enforce the OTO copyrights by virtue of being a member of the OTO. It disposed of this by raising the issue of whether the unincorporated

OTO had ever had the legal capacity to own property. It specifically stated that neither of the parties had raised the issue. Nevertheless, it felt compelled to address the issue and held that the OTO was never sufficiently choate as to have legal capacity to own property. Therefore, it held, Mr. Motta could not enforce any property rights through the OTO.

Plaintiffs appealed to the First Circuit arguing, in part, that it was improper for the district court to have decided the case on an issue never raised by the parties so that plaintiffs were denied their rights without ever having an opportunity to present evidence on the issue deciding the case. The Court of Appeals affirmed, holding that the issue of legal capacity had been raised despite the district

court's explicit finding that the issue of the OTO's legal capacity had not been raised.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has overturned this Court's decision in Reynolds v. Stockton, 140 U.S. 254 (1891) which holds that a court's decision is invalid to the extent it decides uncontested questions not put in issue by the pleadings.

Prior to the district court's decision, there had never been any question raised about the OTO's ability to own property. The issue contested was whether its ownership had passed to the Motta group or the McMurtry group. The district court specifically found that the issue of the OTO's legal capacity had not been raised, and noted

that the issue should normally therefore be considered waived. But the court thought it had to consider the issue sua sponte.

The Court of Appeals, strangely enough, affirmed the district court on the theory that the issue had been raised, pointing to a defense in the answer which questioned plaintiffs' standing on the ground that they were not the owners of an exclusive right in the copyrights. Defendant explained this defense in its brief to the First Circuit as a claim that plaintiffs did not own an exclusive right because another co-owner (Grady McMurtry) had licensed the defendant. Until the Court of Appeals said so, no one had ever thought or claimed that this defense referred to the unincorporated association's possible legal incapacity

to own property.

Plaintiffs have therefore been deprived of their rights without ever being given notice and an opportunity to be heard on the issue which decided the case. (It should be noted that the district court in San Francisco trying the respective rights of Mr. Motta's group and McMurtry's, relied on the Maine decision as collateral estoppel to the effect that plaintiffs do not own OTO property; hence plaintiffs have now lost <u>two</u> cases on an issue no one ever raised or presented evidence on.)

While the thrust of modern civil procedure is to eliminate trial by ambush by the parties, the First Circuit has invented trial by ambush by the courts. While federal courts already are struggling to contend with the great mass of litigation, the First Circuit's

decision would multiply the problem by requiring parties to litigate all issues even if, as in this case, the issues are uncontested. The lower courts in this case have so far departed from the accepted course of judicial proceedings, in conflict with this court's decision in the Reynolds case, as to require an exercise of this Court's power of supervision to protect the integrity of the federal judicial system. Therefore the writ of certiorari should issue.

Respectfully submitted,

By: _____

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October 28, 1985

CERTIFICATE OF SERVICE

I, Daniel B. Stone, hereby certify that on this 28th day of October, 1985, I hand delivered to the Clerk's Office of the U.S. Supreme Court 40 copies of this petition, and on this same day I mailed 3 copies by certified mail, return receipt requested, to James R. Erwin, Esquire, Strater, Hancock & Erwin, P.A., 4A Woodbridge Road, York, Maine 03909, Attorney for Respondent.

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Daniel B. Stone

APPENDIX

APPENDIX INDEX

Opinion of the Court of Appeals... A-02

Opinion of the District of Maine.. A-28

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

July 29, 1985

No. 85-1050

MARCELO RAMOS MOTTA

v.

SAMUEL WEISER, INC.

Appeal from the United States District Court for the District of Maine

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DAVIS, Circuit Judge. In this case of copyright and trademark infringement,1/ Marcelo Ramos Motta and the

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1. Because the district court and the parties have addressed only the copyright issue, this appeal does not concern count IV in the complaint which alleged infringement of appellants' trademarks and servicemarks. Nor does this appeal involve count V dealing with an agreement between appellent Motta and appellee as to publication of a book authored by Motta.

Society Ordo Templi Orientis, plaintiffs below, appeal from an adverse decision by the United States District Court for the District of Maine following a five-day bench trial. At issue is the copyright ownership of the works of Aliester Crowley, an English mystic, author and one time leader of the cult known as Ordo Templi Orientis. The district court held that appellants failed to establish that they own the Aliester Crowley copyrights either in their individual capacities or as members of Ordo Templi Orientis, and therefore entered judgment in favor of the defendant Samuel Weiser, Inc. We affirm.

I.

The origins of this case lie in the mystical and occult world of Ordo

Templi Orientis (OTO).2/ OTO was founded by turn-of-the-century German Masons. Its traditions and rituals emanate from masonic orders which date as far back as the Crusades. For purposes of the current appeal, all we need to know about the rites of the cult is that OTO members pass through a series of grades (e.g., IX°) by taking part in secret rituals. OTO's supreme authority carries the title "Outer Head of the Order" (Outer Head).

Aliester Crowley, the best known Outer Head, wrote the constitution for the order and published part of it in 1919. During his tenure as Outer Head, he also wrote and copyrighted many books, poems and letters which form the

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2. Ordo Templi Orientis (OTO) must be distinguished from Society Ordo Templi Orientis (SOTO) and California Ordo Templi Orientis (COTO). The latter two are further described in Part II, infra.

literary nucleus of OTO's beliefs. Remaining as Outer Head until his death in 1947, Crowley left the copyrights for all his works to OTO in his will which neither party has contested. These works were shown to have a substantial value in the occult book market.

Crowley named Karl Germer as his successor as Outer Head. After attaining OTO's highest position, Germer who lived in New York City, moved to California. He obtained custody of Crowley's existing literary works and published several of the writings. At the time of Germer's death in California in 1962, no one had been expressly named as successor to the ruling position of Outer Head. 3/ The ensuing disputes

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3. It is the parties' common ground that the Outer Head of OTO, if one now exists, can enforce the Crowley copyrights.

between factions and purported members -- further detailed in Part II, infra -- is where the trouble started. Motta is a member of OTO and head of one of the battling groups.

Defendant and appellee Samuel Weiser, Inc. (Weiser), a Maine corporation, publishes and distributes cult books. The annual gross income of Weiser is $1,400,000. Of this total, approximately 5% has come from publishing Crowley works (i.e., $70,000). Appellants allege that they own the copyrights to ten Crowley works which Weiser has published. Weiser responds (among other things) that appellants are without standing to bring the present action because they are not the owners of any of the exclusive

rights in the works of Crowley.4/

At the trial, there was presented conflicting evidence as to (a) Motta's claims that Germer had appointed him, Outer Head; (b) whether others had at least as much right as Motta (and his corporation, appellant Society Ordo Templi Orientis (SOTO)) to the position of Outer Head or title to the Crowley works; and (c) the current status of OTO as an unincorporated organization.

The district court found that appellants' ownership rights could not stem from Motta's capacity as Outer Head because they did not prove that he in fact occupied that position. In

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4. In the alternative, appellee asserts that another OTO member, who (Weiser contends) is at least a co-owner of the copyrights, gave Weiser a license to publish whatever works of Crowley it chose. This argument was not mentioned by the district court, and in view of our disposition it need not be considered by us.

addition, it was found that because there were other people and organizations who were arguably members of OTO, but not members of SOTO, SOTO is merely a corporate member of OTO. Accordingly, the district court held that appellants could only support their claim of ownership as mere members, and representatives, of OTO. However, because (1) OTO is an unincorporated association, not recognized as a legal entity, (2) the succession to the position of Outer Head is undecided, and (3) the membership of OTO is indeterminate, OTO was held to be incapable of owning property through its individual members. In sum, appellants were found to have failed to meet their burden of establishing ownership of the copyrights at issue, and the district court entered judgment in favor of Weiser.

II.

It is beyond dispute that appellants, as plaintiffs in a copyright infringement action, had the burden of proof. 3 Nimmer, The Law of Copyright, § 13.01 (1984). They must prove each of the two elements of copyright infringement: (1) ownership of the copyright; and (2) copying by the defendant. See Knickerbocker Toy Co. v. Azrak-Hamway International, Inc., 668 F.2d 699 (2d Cir. 1982); Ferguson v. National Broadcasting Co., 584 F.2d 111 (5th Cir. 1978). In this appeal, we are confronted with an issue concerning only the former facet.

Under 17 U.S.C. § 501(b), only "the legal or beneficial owner of an exclusive right under a copyright is entitled ... to institute an action for any infringement of that particular

right committed while he or she is the owner of it." If a plaintiff is not the author of the copyrighted work then he or she must establish a proprietary right through the chain of title in order to support a valid claim to the copyright. See Bell v. Combined Registry Co., 397 F. Supp. 1241, 1245 (N.D. Ill. 1975), aff'd, 536 F.2d 164 (7th Cir.), cert. denied, 429 U.S. 1001 (1976). Absent this showing, a plaintiff does not have standing to bring an action under the Copyright Act. Cf. Eden Toys, Inc. v. Florelee Undergarment Co., 697 F.2d 27 (2d Cir. 1982).

A determination of ownership is a conclusion of law based on underlying facts. 3 Nimmer, supra, § 13.01[A]. The district court's conclusion that appellants' failed to establish

ownership will be overturned only if it was erroneous as a matter of law, and the underlying factual findings will not be set aside unless clearly erroneous. Fed. R. Civ. P. 52(a).

The first link in the chain of title occurred here when Crowley devised his copyrights to OTO. Under 17 U.S.C. § 201, ownership of copyright may be transferred by bequest in a will. We do not take issue with appellants' contention that an unincorporated association can take property by bequest and that the intent of the testator should be effectuated. However, the hurdle with which appellants are confronted relates to their capacity to enforce the copyright almost forty years after Crowley's demise. This requires that they establish standing as the beneficial owners of the copyright

either in their individual capacities or as members of OTO. We discuss each alternative.

A. Appellants concede that Motta does not have or claim personal ownership of the Crowley copyrights, but contend that his ownership rights derive from his asserted capacity as Outer Head. Similarly, appellants argue that SOTO is entitled to enforce the Crowley copyrights because, as Outer Head, Motta had the power to incorporate the previously unincorporated OTO. These arguments both depend on whether appellants have met their burden of establishing that Motta is Outer Head.

The trial court's findings reveal that: At the time of Germer's death in 1962, Motta lived in Brazil allegedly working on behalf of OTO and "A.A.," another occult order of mystical

learning. He had been initiated into OTO by Germer around 1955, and subsequently inducted into the IX° grade. Later on, Motta contends, Germer made him Outer Head while on his deathbed. Then, allegedly to provide a corporate structure for OTO, Motta incorporated his five member faction in Tennessee in 1978 under the name Society Ordo Templi Orientis (SOTO).

At trial, it was also shown that Motta is not the only claimant to Crowley's literary legacy. During World War II Crowley visited Grady McMurtry, a California resident. There are letters (the "Caliphate Letters") from Crowley which indicate that McMurtry was considered as a possible successor to Germer. During one of his visits, Crowley inducted McMurtry into the IX° grade. Prior to Crowley's death,

Germer, who recognized McMurtry's preeminent status in OTO, had a falling out with McMurtry. After a period of disinterest which followed Crowley's death, McMurtry returned to California and decided that the OTO organization had disintegrated. He then attempted to rehabilitate the cult. Although he does not claim to be Outer Head, McMurtry contends he is the de facto leader of a group of California followers of Crowley who believe they are the legitimate members of OTO. This faction was incorporated in California under the name California Ordo Templi Orientis (COTO); it has approximately 750 active members. In addition, there are other groups which claim the OTO legacy: Joseph Metzger in Switzerland, Kenneth Grant in England, and a former associate of Crowley, Frederick Mellinger.

In attempting to establish Motta's claim as the Outer Head, appellants offered extrinsic evidence in the form of a letter to Motta from Germer's wife Sascha, written five days after her husband's death. Sascha Germer said in the letter that Germer's last words were that Motta was the "Follower." Appellants have argued that this statement conclusively establishes that Germer appointed Motta to follow him as Outer Head. The district court found, however, no evidence that "follower" has any particular meaning in the OTO vocabulary, or that Motta, prior to the current action, had ever interpreted "follower" to mean that he was Outer Head. Moreover, whatever the statement might have meant, it was afforded little weight by the trial court because it was second generation

hearsay, and Sascha Germer's credibility was "subject to profound question." We are convinced that these determinations, together with the other evidence on which it relied, are sufficient for the district court to have found that Germer did not appoint Motta as Outer Head. Appellants have not persuaded us that these findings are in any way clearly erroneous.

Appellants also attempted to establish Motta's accession to Outer Head by Motta's own testimony. Although he claimed at trial that he was Outer Head, Motta had said a number of times prior to trial that he was not Outer Head, was not eligible to be Outer Head, had to be elected to the position, and was uninterested in OTO. Not surprisingly, the district court found his court testimony and his previous

statements "rife with contradictions." Attempting to rehabilitate Motta's credibility, appellants have urged that a basic precept of OTO is that persons in leadership positions must conceal their status in order to protect themselves from potentially hostile members of the public. Since in their view Motta has the right to conceal his membership and position, appellants argue (citing NAACP v. Alabama, 357 U.S. 449 (1958)) that the district court violated his rights under the First Amendment by finding that it made little difference whether Motta's dissembling had a doctrinal basis. But the fact is that, during cross and redirect examination, Motta was repeatedly confronted with these contradictions and did not offer any explanation. The excuse of belief in a religious doctrine

of concealment came from apellants' counsel in a post-trial brief. And even if such a tenet existed in fact, there was no evidence that either Crowley or Germer, during their respective reigns, kept their positions in the dark. Also, as the trial judge indicated, the source of dissembling is irrelevant to a determination of credibility, which includes (among other things) the fact that the witness actually may be dissembling. Because we must give due deference to the trier's right to determine credibility of an admitted dissembler, we have to accept as not clearly erroneous the district court's finding that Motta is not the Outer Head. It follows that the district court did not err in concluding that neither Motta nor SOTO owns the Crowley copyrights by virtue of the former's

alleged position as Outer Head. 5/

B. Motta and SOTO may still have a valid claim to ownership if they can prove that, as plain members of an unincorporated association, they can enforce the copyrights. Appellants correctly cite Byam v. Bickford, 140 Mass. 31, 2 N.E. 687 (1885), for the proposition that members of a voluntary association can take title to real property as tenants in common. Since Motta and SOTO are both members of OTO (the argument goes), they own the Crowley copyrights as tenants in common with the other OTO members. The district court found, however, that the membership and structure of OTO is

5. We have also reviewed appellants' appeal relating to its motion to amend the record, and find no reason to disagree with the district court's conclusion that even if the proffered documents had been admitted, the outcome would not have been altered.

too indefinite and amorphous, so that its members lack the capacity to own property as tenants in common, thereby precluding appellants' standing to enforce the Crowley copyrights. We cannot fault this analysis.

An unincorporated association is defined as a body of persons acting together and using certain methods for prosecuting a special purpose or common enterprise. Black's aw Dictionary 111 (5th ed. 1979). Such an organization is not recognized as a legal person or entity capable of owning property on its own. See Moffatt Tunnel League v. United States, 289 U.S. 113 (1933). But this rule is not absolute. Courts may determine that ownership vests in the individuals who comprise the

organization. See Byam, supra. 6/ Thus, the inquiry must be whether OTO is the type of association as to which the law permits ownership rights to vest in the association's members.

In Byam v. Bickford, supra, real property was permitted to vest in an unincorporated association's members because all of the members could be ascertained. In contrast, where membership is not fixed and new members are continually being added and lost, such vesting has not been allowed. State v. Sunbeam Rebekah Lodge No. 180, 169 Or. 253, 127 P.2d 726 (1942). Without this limitation of an

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6. In addition, the right of ownership also may vest in the association upon authority of statute. Appellants have not pointed the district court or this court to any such statute, nor have we been able to find such statutory authority.

ascertainable membership, the public, or even the members of the association, would not have notice or be cognizant of who claimed ownership in a particular property. This policy is exemplified in Johnson v. Smith Blue Hill Cemetery Ass., 221 A.2d 280 (Me. 1966), where a bequest was made to an unincorporated association. In analyzing the association's capacity to own property, the Supreme Judicial Court of Maine found that, even though the association held meetings and elected officers, it was too amorphous in light of the fact that membership was uncertain, could not be ascertained with any reasonable degree of accuracy, and there was no by-law which regulated or defined the criteria for membership eligibility. The court held that the association did not have sufficient capacity to own the

devised property, thus precluding vesting of title in the alleged members.

In the current case, there are many claimants to the OTO legacy and to OTO membership, including SOTO and COTO. Also, there was no evidence of any standards identifying membership in OTO or of successorship to be the Outer Head. Since Crowley's death, the status of OTO has led to disputes between different factions, some of which allegedly expelled the others. Appellants failed to put forth evidence establishing a particular group of people that could lay exclusive claim to membership in OTO. As in Johnson, supra, the district court found that OTO is not an actual assemblage of people associating for some common discernible purpose, but is now merely an amorphous and attenuated fraternal fellowship

existing only in the abstract. Appellants have not persuaded us of clear error (on this record) in this finding or its subsidiary findings. They have therefore failed to meet their burden of establishing themselves as beneficial owners of the Crowley copyrights.

C. Notwithstanding what we have just decided, appellants assert that their right to due process and procedural regularity was impinged because the district court decided the case on the basis of an issue (i.e., OTO's lack of this type of capacity) not addressed by the parties in the pleadings or at trial. Citing Reynolds v. Stockton, 140 U.S. 254 (1891), appellants urge that the issue of OTO's capacity to own property was not "tendered by the pleadings," and that

such capacity was assumed by both parties. We believe, however, that the requirement in Reynolds that such issue must be "tendered by the pleadings" was satisfied in this case.

In their complaint, appellants alleged their ownership of the Crowley copyrights as individuals. In its answer, appellee alleged, by way of affirmative defense, that appellants lacked standing under 17 U.S.C. § 501(b). There is no admission in the pleadings and the parties did not in any way stipulate to OTO's capacity to own property. Moreover, as appellants themselves point out by citing Byam v. Bickford, supra, the law clearly requires that the membership and form of an unincorporated association must be ascertainable for that association to have the capacity necessary for its

members to own the property together. Appellants cannot now say (as they do) that, had they been on notice of this element, they would have proffered a "mountain of evidence" consisting of membership lists and regulations setting forth membership criteria. Not perceiving or recognizing one of the legal elements necessary to meet one's burden is not the responsibility of anyone but the party who carries that burden. 7/

The issue of ownership goes to standing to bring a copyright action. Appellants' infringement claim is derived from OTO's alleged ownership of the copyrights. OTO's capacity to assert ownership through its members,

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7. The decisions on which appellants rely relate to issues not raised by the pleadings or tried by the parties.

when no Outer Head has been established, is inherent in appellants' burden of proving ownership. The district court did not commit error in addressing that sub-issue of OTO's capacity to own the Crowley copyrights.

For these reasons, we hold that the district court properly concluded that appellants failed adequately to prove ownership; of the Crowley copyrights. The judgment of the district court is therefore affirmed.

AFFIRMED.

UNITED STATES DISTRIC COURT
FOR THE DISTRICT OF MAINE

December 6, 1984

Civ No. 81-0459-P

MARCELO RAMOS MOTTA

v.

SAMUEL WEISER, INC.

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND OPINION

I. Introduction

This is an action for copyright and trademark infringement. The center of this controversy is the literary legacy of Aleister Crowley, an English citizen who died in 1947. Crowley was the dominant figure in the Ordo Templi

Orientis (OTO), a quasi-Masonic secretfraternity that was founded near the beginning of the twentieth century in Germany. Crowley wrote prolifically during his lifetime, and some of these writings have been published by the defendant in this case. Upon his death, Crowley devised his literary remains to the Ordo Templi Orientis.

Plaintiffs claim ownership of the Crowley copyrights and allege that these copyrights were infringed by Defendant. Plaintiff Motta is Supervisor General of the Society Ordo Templi Orientis (SOTO), a Tennesee corporation that was organized by him in 1978. Plaintiffs allege that the SOTO is legally cognizable as the successor to the OTO to which Crowley willed the rights to his literary remains. Motta alleges

that he is the successor to Karl Germer, Crowley's successor, as "Outer Head of the Order" (OHO), or leader, of the OTO.

The action was tried to the Court in a trial that lasted five days. A full transcript of the testimony was prepared, and the parties have submitted post-trial briefs and proposed findings of fact and conclusions of law. The Court has concluded that Plaintiffs have failed to sustain their burden of proving that they own the Crowley copyrights in their individual capacities or, alternatively, that they may derive ownership from the OTO. Therefore, their claim of copyright infringement must fail.

In making the following findings of fact, the Court found it unnecessary to attempt to penetrate the mystical nature

and occult practices of the OTO. It is sufficient to observe that OTO initiates aspire to pass through a series of mystical grades by taking part in secret rituals. The parties agree that the supreme authority within the organization is the Outer Head of the Order, and that Crowley occupied this position until he died. The prose, poetry and rituals authored by Crowley form the literary nucleus of the belief system of OTO devotees, and they have proven to have substantial value on the occult book market.

II. Findings of Fact

The parties agree that the highest position of authority in the OTO, as conceived of and practiced by Aleister Crowley, is the Outer Head of the Order, or OHO. The parties agree that Crowley

was the OHO of the OTO by self-designation until he died in 1947. Crowley left a will in which he devised "all the copyrights in my books and writings whatsoever and wheresoever including any copyrights over which at the date of my death I may have power of disposition to the Ordo Templi Orientis." Plaintiff's Exhibit 12(a). Neither party contests the validity or legal effect of the will, which was probated in England in 1949. Id.

Plaintiffs contend and Defendant does not contest that Karl Germer succeeded Crowley as OHO of the OTO. Germer was a resident of New York City at the time he acceded to the position of OHO and later moved to California. Germer obtained custody of Crowley's extant literary remains, and was

involved in publishing several of Crowley's writings. Germer died in California in 1962. At the time of his death, he had not expressly named a successor as OHO of the OTO.

Plaintiff Motta, who spent his childhood in Brazil and speaks Portuguese as his native language, currently has a visa to reside in the United States. Tr. at 24, 25. Motta was initiated into the OTO by Germer in California in 1955 or 1956. Tr. at 39-40. Motta corresponded with Germer, often regarding OTO matters, regularly until Germer's death. Motta also visited with Germer at least three times. Motta testified that he spent a number of years in Brazil working on behalf of the OTO and another organization by the name of the "A.A.,"

described by Motta as "an occult order for mystical occult training." Tr. at 97; see also Tr. at 209-211.

Plaintiffs introduced a number of exhibits which they claim prove that Motta is Germer's successor as OHO of the OTO. In 1956 Germer wrote to Motta in Brazil indicating, "I am willing to give you a document as my representative for a limited time, but I would have to prepare you for it!" Plaintiffs' Exhibit 7 (emphasis added). This statement cannot constitute direct evidence supporting Motta's allegation that Germer appointed him OHO. First, Germer intended only to appoint Motta his representative, not his successor as OHO. Second, the context of the statement indicates that Motta's authority was to be limited to Brazil.

Third, the representation was to be granted only for a limited time. Finally, the representation was conditioned upon Germer's preparing Motta for it, and it was not proven that any such document was ever given by Germer to Motta.

In 1962 Germer wrote to Motta regarding a collection of "Crowleiana":

> Please study this matter carefully and let me soon know if you are interested in buying the collection. Some years ago I suggested to Estelle to sell to the Sidney Library, from the consideration that that [sic] Australia is far enough distant from the political turmoil to assume that these valuable Crowleiana might survive a holocaust. South America also applies. Needless to say that I would like nothing better than this stuff to be in your hands, provided you can keep its possession secret and safe.

Plaintiffs' Exhibit 13. In 1961, Germer wrote to Motta:

> I can see that you have been tentatively admitted into what I may call the thelemic chain; it will take long, patient, persistent work to prove yourself. In any case: YOUR WORK AT THIS PHASE is in BRAZIL, and nowhere else. It is demanded that you learn to stand on your own feet with courage and with confidence. It is very possible, even probable, thatthe call is for you to prepare [sic] the ground for the establishment of a H.Q. somewhere there where ultimately -- before "Armageddon" -- the archives can be moved. This may be a year or more off.

Plaintiffs' Exhibit 14. No inference that Germer designated Motta his successor may be drawn from these statements. They indicate only that Germer tentatively perceived Motta to be a desirable purchaser of the Crowley collection because of Motta's residence in South America, "distant from the political turmoil." Moreover, the evidence indicates that Germer never

effectuated his speculations.

Plaintiff Motta relies upon the preceding references as evidence that he is Germer's successor. He relies most heavily, however, upon a letter written to him five days after Germer's death by Germer's widow. Mrs. Germer stated in pertinent part:

> Our beloved Master is Dead
> He succumbed Oct. 25, 8:55 P.M.
> under horrifying circumstances.
> You are The Follower
> Please take it from me, as he
> died in
> my Arms and it was his last
> Wish! Who
> the Heir of the Library is, I
> do not know up to now.

Plaintiffs' Exhibit 16(b) (emphasis in last sentence added).

On January 26, 1963, Mrs. Germer wrote to Motta:

> But forget about me, You are Young, You are the Future of the Work, I did not believe when Karl said: It takes another 10 Years to Make Motta the Heir! But Spiritually you are his Heir! you have to work on in Brazil, if You are stubborn You are not stubborn to me, You fight the Work!

Plaintiffs' Exhibit 19(b) (emphasis in original).

The "You are the Follower" statement does little to substantiate Motta's claim to be Germer's successor as OHO of the OTO. First, the evidence of record indicates that the word "follower" does not have any particular meaning in OTO parlance.1/ Motta now

---

1. Plaintiffs argue to the contrary in their reply brief:

> Both of defendant's witnesses who supported that proposition [that "the follower" has no meaning in OTO parlance] were probably not aware of Verse 76, Book 2 of THE BOOK OF THE LAW which reads as follows: (cont'd)

interprets Mrs. Germer's statement to mean that he is OHO, but there is no evidence that he ever so interpreted it prior to this trial.

Second, whatever the statement might mean, the Court can accord it very little weight. It is second generation hearsay, admitted as the dying declaration of Germer, see Fed. R. Evid. 804(b)(2), and the excited utterance of Mrs. Germer. See Rule 803(2). Third,

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(cont'd)

> What meaneth this, o prophet? Thou knowest not; nor shalt thou know ever. There cometh one to follow thee: he shall expound it. But remember, o chosen one, to be me; to follow the love of Nu in the star-lit heaven; to look forth upon men, to tell them this glad word.

(Emphasis added.) This passage was not introduced as substantive evidence at trial and has not been so admitted by this Court. Even if the Court were to consider it, the passage does not support Plaintiffs' argument that "the follower" has the special meaning which Plaintiffs attempt to ascribe to it.

Mrs. Germer expressly stated that she did not know who the heir to the library was. Moreover, the diary entries of Mrs. Germer written prior to and at the time of her husband's death and other evidence demonstrate that her perception of reality at that time had deteriorated, and her credibility is subject to profound question.

Under direct examination, when asked what position he holds in the OTO, Motta stated: "I am afraid that I must say that I am the Outer Head." Tr. at 119. On cross-examination, Motta said, "I regret to have to repeat that I am now the Outer Head of the order." Tr. at 133. Motta alleged at trial that he became the Outer Head upon Germer's death in 1962, and he bases his claim upon Mrs. Germer's statement, "You are the Follower." Tr. at 134. Some

circumstantial support for Motta's claim is provided by evidence, summarized above, indicating that he corresponded frequently with Germer and that he had a serious commitment to studying, editing, and publishing the works of Aleister Crowley.

On the other hand, substantial evidence was introduced which tends to believe Motta's claim of status within the OTO. Although Motta claimed at trial to have assumed the position of OHO upon Germer's death in 1962, he stated a number of times subsequent to Germer's death to several different people that he was not the OHO. Tr. at 134, 135, 147; Defendant's Exhibits 18, 52. Motta stated at least twice that he was not eligible to be OHO, Defendant's Exhibits 52, 18, and at least twice that

it was necessary to elect a new OHO to succeed Germer. Defendant's Exhibit 18.

Although Motta's interest in the writings of Crowley is not to be doubted, his professed interest in the OTO as an organization is not supported by the record. He stated at least twice that he was never very interested in the OTO. Defendant's Exhibit 52, and Tr. at 192. He stated several times that he preferred the A.A., see supra at 4, to the OTO. Defendant's Exhibits 71 (1957), 72 (1961), 60 (1971), 52 (1974).

Also, the Court is not persuaded of Plaintiff Motta's credibility on the central question regarding his status in the OTO, and, therefore, can accord very little weight to his testimony. His testimony and correspondence are rife with contradictions. The contradictory

statements about his claim to be OHO and his interest in the OTO are cited above. Examples of Motta's peculiar attitude toward the truth abound in his testimony:

[by Mr. Erwin]

Q And that's a letter you wrote to Mr. Grant in 1971?

A Yes, sir.

Q Do you recall telling him: "I am not concerned with the OTO as such"?

A Yes, sir.

Q Was that true at the time?

A Yes and no

Q Well, did you mean it?

A It was an attitude that I assumed.

Q Well, either you meant it or you didn't mean it, Mr. Motta?

A I did not mean it.

Tr. at 166-67.

Motta explained his inconsistency about his claim to be OHO as follows:

> Sir, I have been answering your questions and apparently I have not been calling myself a liar here. I am not interested in power or titles and I am much more interested in seeing the OTO on its feet working harmoniously together constructively than to be called the Outer Head of the OTO. I have avoided calling myself the Outer Head of the OTO because I know lots of people aspire to that title and if one of them could have shown to me that he or she is in a position right now to assume it, I would gladly let them have it. So that's why I have avoided using the words Outer Head of the order in relationship to myself, but because I truly would rather be doing something else, but I have promises to keep and miles to go before I sleep.

Tr. at 169. The Court rejects this explanation because it was not proven that Motta laid claim to the title at any time between Germer's death in 1962 and the commencement of this lawsuit.

Furthermore, Motta advances no objective criteria by which his assertion that no one else is eligible to be OHO may be evaluated. Rather, his claim is based solely on his own subjective, self-serving assertions.

Plaintiffs' explanation in their post-trial brief for the numerous contradictions in Motta's testimony and correspondence is that "basic doctrine of the OTO requires people in leadership positions to dissemble about those subjects." Reply Brief of Plaintiffs at 6. First, it is strange that Plaintiff Motta, who was repeatedly confronted with these contradictions upon cross-examination and given the opportunity to explain them on redirect, did not offer this as an explanation at trial. Second, and more importantly, it makes little difference to the Court

whether Motta's dissembling has a doctrinal basis or is simply the product of a dishonest mentality. In either case, the Court can assign very little weight to the testimony of an admitted dissembler.

Testimonial and documentary evidence reveals that Motta is not the only claimant to Crowley's literary legacy. Grady McMurtry is a California resident who met Crowley when he was serving in Europe at the conclusion of World War II. The evidence includes several letters from Crowley to McMurtry indicating Crowley's belief that McMurtry was a possible successor to Germer. Defendant's Exhibits 44, 45, 63, 64. Germer himself recognized that McMurtry held a preeminent historical status in the OTO several times during

the 1940s and the 1950s. See Defendant's Exhibits 66, 67, 68, 69.

At some point prior to Germer's death, McMurtry and Germer had a falling out. McMurtry left California in 1961 and went to Washington, D.C. to work for the Federal Government. Tr. at 510. He returned to California in 1969. Tr. at 511. Upon his return, McMurtry found that the OTO organization "had disintegrated." Tr. at 513. McMurtry does not claim to be OHO, but he is the de facto leader of a group of California devotees of Crowley who consider themselves the legitimate OTO. McMurtry's organization is incorporated in California. Tr. at 508.

James Wasserman, a member of the California incarnation of the OTO, testified that the California-based

organization has "approximately 750 members in active standing worldwide." Tr. at 245. Wasserman was a former associate of plaintiff Motta and at one time had a power of attorney from Motta to act on his behalf in order to obtain access to the Crowley library. Tr. at 216. Wasserman was also at one time an employee of Defendant Samuel Weiser, Inc. Tr. at 217. While in California in 1976 representing Motta and Defendant, Wasserman was initiated into the OTO by McMurtry. Tr. at 236. Wasserman testified that at that time Motta was not attempting to run any kind of OTO in the United States. Tr. at 235.

Motta incorporated his group as the Society Ordo Templi Orientis (SOTO) in Tennessee in 1978. Plaintiffs' Exhibit

35. He claims a total membership of five. Tr. at 214.

McMurtry entered into a contract to publish the "Thoth Tarot Cards" as "caliph" of the OTO in 1970. Defendant's Exhibit 47. In 1976 McMurtry obtained an order in the Superior Court of the State of California which stated that McMurtry was the "duly constituted and authorized representative of the Ordo Templi Orientis" and that he therefore had the right of possession of OTO literary materials that had been left by Karl Germer. Defendant's Exhibit 59. The evidence is conflicting about whether Plaintiff Motta received notice of the proceeding. It is unnecessary to resolve this factual issue; the Court accepts the Court Order only as

circumstantial evidence of McMurtry's state of mind with respect to his status in the OTO.

The evidence demonstrates that there are still other possible claimants to the OTO legacy. These include a group in Switzerland led by a Joseph Metzger, Defendant's Exhibits 20, 50, a group in England led by a Kenneth Grant, Defendant's Exhibit 5, and a former associate of Crowley by the name of Frederick Mellinger. Plaintiffs' Exhibits 75, 76. The Court need not decide whose claim is superior. The Court simply finds as a fact that Plaintiffs represent only one of several groups who claim to be legitimate successors to Aleister Crowley's original OTO.

There is no evidence indicating that

the OTO was ever incorporated during the lifetime of either Crowley or Germer. Crowley's will left his literary remains to the "Ordo Templi Orientis." He named two literary executors; Louis Umfraville Wilkinson and John Symonds, both English citizens. Their role, potentially significant, in the disposition of the copyrights is not addressed by either party. Crowley's will contains no statement concerning the membership or geographical distribution of the Ordo Templi Orientis to which he devised his copyrights. The evidence presented does not include any externally verifiable criteria for membership in the OTO or for devolution of the title of OHO at the time Crowley died, at the time Germer died, or today. The Court accordingly finds that

the membership of the OTO is indefinite and cannot be ascertained. The Court also finds that Plaintiff Motta has failed to prove that Karl Germer ever appointed him successor as OHO.

III. Conclusions of Law

Plaintiff Motta and SOTO do not own the Crowley copyrights in their individual capacities.

The OTO is not proven to be an unincorporated association having legal status to own property. Therefore, Plaintiffs cannot derive ownership of the copyrights from the OTO.

IV. Pending Motions

One pretrial motion and five post-trial motions remain to be decided in this case.

Defendant moved to amend its answer on February 27, 1984, two days before

trial began. Defendant sought to add ten "affirmative defenses" to its answer. The Court permitted the amendments on the condition that:

> Plaintiff is not precluded from arguing in respect to any affirmative defense pleaded therein that such defense has been waived under the Federal Rules of Civil Procedure, Rule 12(b) and (h), or by other operative principle of law by failure to previously plead such defense as required by those rules of law.

Tr. at 12. Because the Court has determined that the issue of ownership, on which Plaintiffs have the burden of proof, is dispositive in this case, it is unnecessary for the Court to reach the question whether Defendant's Answer should be amended to include "true" affirmative defenses.

Plaintiffs have filed four post-trial motions concerning

registration of various copyrights with the United States Copyright Office: a Motion to Amend Complaint, filed July 3, 1984; a Motion to Amend Record, filed July 20, 1984; a Motion to Amend Record, filed July 26, 1984; and a Motion to Amend Record, filed September 17, 1984. Because the Court has determined that Plaintiffs have failed to sustain their burden of proving ownership, the issues posed by these motions respecting registration of specific copyrights are moot and need not be reached by the Court.

Plaintiffs have also moved to amend the record, on September 20, 1984, to introduce three documents, alleged to be a letter from Germer to Motta, a letter from McMurtry to Germer, and a letter from Germer to McMurtry. Defendant

objected on the stated grounds, inter alia, that the documents have not been authenticated and no foundation for their admissibility has been provided. Defendant's objection is well-founded, and, accordingly, the Motion to Amend Record shall be denied. The Court notes that it has reviewed the proferred documents and that, even if they were to be admitted, they would not alter the findings contained in this decision.

V. Opinion 2/

A.

Plaintiff Motta does not claim personal ownership of the Crowley copyrights. Rather, he contends that his ownership rights are derived from his

2. This case would present difficult questions as to choice of law with respect to the issue of ownership were there any conflict in the law of the interested jurisdictions. First, there is the issue of whether state or federal law applies to the issue of ownership. (footnote cont'd)

capacity as OHO or member of the OTO.

Plaintiffs' Brief at 8-10.

Plaintiffs contend, however, that

(cont'd) There is authority supporting the view that state law should apply to issues respecting ownership in actions brought under the Federal Copyright Act. See Bartsch v. Metro Goldwyn Mayer, nc., 391 F.2d 150, 153; Fantastic Fakes, Inc. v. Pickwick International, Inc., 661 F.2d 479, 483 (5th Cir. 1981); De Sylva v. Ballentine, 351 U.S. 570 (1956). Second, there is the question as to whether state or federal choice of law unless apply where jurisdiction is founded upon a federal question. See Pennzoil v. Federal Energy Regulatory Commission, 645 F.2d 360, 387 (5th Cir. 1981) (federal choice of law rules apply); compare Klaxon v. Stentor Electric Manufacturing Co., Inc., 313 U.S. 487 (1941) federal court sitting in diversity must apply choice of law unless of forum state). Finally, there is the question of which state's law should apply. Here, Maine, Tennessee and California are interested jurisdictions. The Court has reviewed the law of the various interested states and the federal "common law" and has determined that there is no conflict with respect to the fundamental principles that are decisive in this case. Accordingly, it is unnecessary to undertake an extended choice of law analysis.

Plaintiff SOTO is the owner of the Crowley copyrights. Plaintiffs' Brief at 10. SOTO was incorporated by Motta in Tennesee in 1978; Motta claims a nationwide membership of five individuals. The court has found that other persons with viable claims to OTO membership are not members of Plaintiff SOTO. Any claim by Plaintiff SOTO that it is the exclusive successor to the sociational name, "OTO," must, on this record, fail. At best, Plaintiff SOTO is shown to be merely a corporate member of the organization known as the OTO. Plaintiff OTO's ability to assert in a legal forum a claim of ownership of the Crowley copyrights, therefore, must be derived from its capacity as an OTO member.

In summary, neither Plaintiff has proven direct ownership of the

Crowley copyrights. Any rights they may have must be derived from their status within the OTO.

B.

Plaintiffs have the burden of proving that they own the copyrights in an infringement action. Knickerbocker Toy Co., Inc. v. Azrak-Hamway International, Inc., 668 F.2d 699 (2d Cir. 1982); Walker v. University Books, Inc., 602 F.2d 859 (9th Cir. 1979); Ferguson v. National Broadcasting Company, Inc., 584 F.2d 111 (5th Cir. 1978). If the OTO is not a legal entity capable of owning property, Plaintiffs cannot own the copyrights, and their infringement action must fail.

One of the fundamental precepts of Anglo-American jurisprudence is that a right, to be enforced in a court of

law, must have a "holder" or "bearer." See IV R. Pound, Jurisprudence 192 (1959). There must be a "legal unit" to which the right attaches. Id. This may be a natural person or some other entity which has been accorded legal personality by common law or statute.

The concept of legal personality is to be distinguished from the concepts of standing and capacity. Standing focuses primarily upon the relationship between a person and a legal claim. See 13 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3531 (1984). Capacity, as normally used, connotes capacity to engage in legal transactions or to obtain judicial relief. Dean Pound explained:

> Capacity for rights must be distinguished from capacity for legal transactions (i.e., for acts intended to produce legal

> consequences to which the law, giving effect to the intention, attaches the intended consequence), capacity for wrongs (i.e. for acts involving civil liability for infringement of rights in rem), and capacity for crimes (i.e. for breaches of absolute duties for which the law provides penal consequences). Want or loss of legal personality, therefore, is quite another thing from lack or loss of capacity for legal transactions or for wrongs or for crimes or for all of them. A person may have legal rights (using rights in the broader sense) and yet be incapable of legal transactions, or incapable of incurring legal liability, or incapable of responsibility for what would otherwise be accounted crimes.

IV R. Pound, Jurisprudence 276-77.

The record in this case poses the fundamental question as to whether the OTO is a person in the law. Under the common law, an unincorporated association is not recognized as a legal entity. Moffatt Tunnel League v. United States, 289 U.S. 113, 118 (1933); Johnson v. South Blue Hill Cemetery

Association, 221 A.2d 280 (Me. 1966); Byam v. Bickford, 2 N.E. 687, 140 Mass. 31 (1885); State v. Sunbeam Rebekah Lodge No. 180, 127 P.2d 726, 169 Or. 253 (1942). Relief from this rule is available in two different ways. First, courts may determine that a right such as ownership which cannot vest in the association as an entity may vest in the individuals who comprise the organization. See, e.g., County of Trinity v. Rourke, 79 Cal. Rptr. 902, 275 C.A.2d 628 (1969); Flanagan v. Benvie, 273 P.2d 381, 58 N.M. 525 (1954); Rhode Island Association for Blind v. Nugent, 206 A.2d 527, 99 R.I. 187 (1965); Byam v. Bickford, 2 N.E. 687, 140 Mass. 31 (1885); Johnson v. South Blue Hill Cemetery Association, 221 A.2d 280 (Me. 1966). Alternatively some states have enacted statutes

conferring entity status upon unincorporated associations for one or more purposes. See, e.g., Cal. Corp. Code § 20001 (West 1977) (permits "any unincorporated society or association" to hold property); 14 M.R.S.A. § 2 (1980) (unincorporated association may sue in the name of its trustees).

It is elementary that a court may not recognize an association as a legal entity under a statute or, alternatively, determine that a right vests in the individual members of an association unless the association has a distinct, identifiable membership. See Johnson v. South Blue Hill Cemetery Association, 221 A.2d 280 (Me. 1966); State v. Sunbeam Rebekah Lodge No. 180, 127 P.2d 726, 169 Or. 253 (1942). An "association" that exists in name only is not an association at all, as the

term is defined in both common and legal vernacular. Although the formalities of the corporate form are by definition absent, an unincorporated association must have certain characteristics which justify its recognition as an entity or as a distinct group of individuals.

The term "unincorporated association" has been defined as:

> A voluntary group of persons, without a charter, formed by mutual consent for the purpose of promoting a common enterprise or prosecuting a common objective.

Local 4076, United Steelworkers v. United Steelworkers, AFL-CIO, 327 F. Supp. 1400, 1403 (W. D. Penn. 1971).

The term was elsewhere defined similarly as

> [an] organization composed of a body of persons united without a charter for the prosecution of some common enterprise. Meinhart v. Contresta, 194 N.Y.S. 593, 594 (Sup. Ct. Spec. Term 1922).

California Clippers, Inc. v. United States Soccer Football Association, 314 F. Supp. 1057, 1068 (N. D. Cal. 1970). The Supreme Court had occasion to expound upon the ordinary meaning of the term "association" as it is used in the law:

> It has been defined as a term "used throughout the United States to signify a body of persons united without a charter, but upon the methods and forms used by incorporated bodies for the prosecution of some common enterprise." 1 Abb. Law Dict. 101 (1879); 1 Bouv. Law Doct. (Rawle's 3rd Rev.) 269; 3 Am. & Eng. Enc. Law (2d ed.) 162; and Allen v. Stevens (App. Div.), 54 N.Y.S. 8, 23, in which this definition was cited with approval as being in accord with the common understanding. Other definitions are: "In the United States, as distinguished from a corporation, a body of persons organized, for the prosecution of some purpose, without a charter, but having the general form and mode of procedure of a corporation." Webst. New Internat. Dict. "[U.S.] An organized but unchartered body analogous to but distinguished

> from a corporation." Pract. Stand. Dict. And see Malley v. Bowditch (C.C.A.), 259 Fed. 809, 812; Chicago 60 Title Co. v. Smietanka (D.C.) 275 Fed. 60: also United Mine Workers v. Coronado Co., 259 U.S. 344, 392, in which unincorporated labor unions were held to be "associations" within the meaning of the Anti-Trust Law.

Hecht v. Malley, 265 U.S. 144, 157 (1923). See also Penrod Drilling Company v. Johnson, 414 F.2d 1217, 1222 (5th Cir. Health Care Equalization Committee of the Iowa Chiropractic Society v. Iowa Medical Society, 501 F. Supp. 970, 976-77 (D. Iowa 1980).

These definitions make it clear that an unincorporated association is more than a name; the concept connotes a well-defined group of legal persons connected by a common purpose or interest. This common purpose or interest affords a court objective criteria by which it may ascertain the

membership. Lacking such criteria, a court cannot grant requested relief to the members of an association. See Johnson, 221 A.2d at 283; Sunbeam Rebekah Lodge, 127 P.2d at 731. In Johnson, the Maine Supreme Judicial Court identified the obstacles to permitting a testamentary gift to vest in the members of a volunteer, unincorporated cemetery association:

> The actual membership of the Association at the time of the testatrix's death is uncertain and cannot be ascertained with any reasonable degree of accuracy. No by-law exists which regulates or defines eligibility for membership . . . No criterion of membership being established, neither the purchase of a cemetery lot nor a donation to the Association without more was sufficient to characterize such action as an assent on the part of the purchaser or donor to become a member of the Association. Thus, in the instant case, basic and necessary conditions upon which membership in the defendant Association could be predicated are wanting,

> and rights and liabilities as usually arise from membership in an unincorporated voluntary association cannot be left for their enforcement to such loose contacts as evidenced herein. The membership in the South Blue Hill Cemetery Association was not sufficiently definite and determinate.

Johnson, 221 A.2d at 283 (emphasis added).

The Court has found that Plaintiff SOTO, a Tennessee corporation, is at best one of many actual or potential claimants to OTO membership. On the evidence before the Court is is not possible to identify a chain of successorship which enables the Court to recognize a definite organization which has the exclusive right to use of the OTO associational name. Crowley identified several possible successors to himself and Gemer, and Motta was not one of them. The Court has found that Germer did not appoint Plaintiff Motta

as his successor. When they discussed possible successors in their correspondence, both Crowley and Germer wrote in vague, noncommittal terms. Tehy both often changed their opinions of thief followers and sometimes about each other. Their judgments about OTO hopefuls with whom they corresponded were highly subjective and are not capable of translation by this Court into objective criteria by which the present-day membership of the OTO may be ascertained. Their correspondence, like most of the letters introduced in the case, is steeped in intrigue and recrimination. The evidence adduced at trial demonstrates that anyone who engaged in correspondence with Crowley and Germer regarding OTO could not be prevented from starting his own group under the OTO banner.

The reality is that neither Crowley nor Germer articulater, prior to their deaths, anything resembling a set of objective criteria by which the Court can determine the repository of OTO authority or the limits of its membership. Crowley's legacy is not an organization of definite membership, but an amorphous set of ideas and rituals which may be appropriated by any Crowley or OTO aficionado. The record does not prove the evolution, subsequent to the deaths of Crowley and Germer of any authoritative criteria to determine membership in any discrete group of persons known as the OTO. In short, the OTO is not a legal "person" capable of owning property as an entity or through its individual members.

Having failed to prove that Plaintiffs own the copyrights in their

individual capacities, Plaintiff Motta is forced to resort to claiming ownership as a member of the OTO. Plaintiff insists that the Court can award its "ultimate judgment" to the OTO and that it need not decide who are the true followers of Aleister Crowley. It is true that the Court need not choose among rival claimants, but the Court must determine that the OTO has legal personality in order to find that it is capable of ownership. Such a determination cannot be made on this record. The critical distinction is that to be made between a design for a fraternal fellowship that exists only in the abstract, on the one hand, and an actual assemblage of human beings associated for some unique or discernible purpose, on the other. The OTO is shown by this record to have been

nothing more than an idea in the mind of Aleister Crowley which was embraced by that of Germer.

Even if the Court assumes (the evidence suggests otherwise) that Crowley was the leader of an identifiable association of persons who sought to execute his idea, that he expressly appointed Karl Germer to succeed him as leader, and that Germer also presided over an identifiable association of persons united by Crowley's fraternal idea, the record before the Court falls far short of proving that, at the present time, or at the time of the alleged infringements, any particular group of human beings could lay exclusive claim to be the OTO, as conceived by Aleister Crowley when he devised his literary rights to the OTO. The abstract idea of an OTO persists,

available to be appropriated by anyone so inclined, but no single group of persons having exclusive right to use of the OTO name appears from this record to exist.

Finally, the Court should take note of the fact that neither Plaintiffs nor Defendants expressly raise in a discrete contact the issue as to whether the OTO is a cognizable legal entity. Ordinarily, when an issue is not raised, it is waived. In this case, however, there are at least two compelling reasons why the Court must deal with the issue sua sponte.

First, there is no question that the parties raised the issue of Plaintiffs' ownership of the copyrights as an element of a claim of infringement, and capacity for ownership is an essentialo predicate to such ownership.

Plaintiff Motta's infringement claim is derived from the alleged ownership of the OTO. He has a claim only if ownership of Crowley's literary remains is vested in the OTO. In light of this posture, the Court can hardly overlook the question of whether the OTO is capable os such ownership.

Second, the question as to whether an entity is sufficiently well-defined to be legally cognizable is so fundamental to the effective ness of the Court's ultimate order that the Court must consider the issue on its own motion. It is in essence a consider-ation going to justifiability, which may be raise sua sponte. Cf. Bergstrom v. Bergstrom, 623 F.2d 517, 519 n.1 (8th Cir. 1980)()issue of ripeness may be raised sua sponte at any stage of

proceedings); Juidice v. Vail, 430 U.S. 327, 331-32 (1977)(issue of standing raised sua sponte).

Accordingly, it is ORDERED that Judgment be entered in favor of Defendant.

So Ordered.

/S/ Gene Carter, District Judge

85-723

Supreme Court, U.S.
FILED
NOV 25 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

MARCELO RAMOS MOTTA,
Petitioner

v.

SAMUEL WEISER, INC.
Respondent

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

Was proof of the capacity of an unincorporated association to own property inherent in petitioner's burden to prove the ownership element of a copyright infringement claim, where his ownership stemmed solely from his membership in the association?

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OPINIONS AND JUDGMENTS BELOW

The opinion and judgment of the Court of Appeals for the First Circuit, affirming the trial court's decision, is Motta v. Samuel Weiser, Inc., 768 F.2d 481 (1st Cir. 1985).

The opinion and judgment of the District Court for the District of Maine, in favor of the defendant, is Motta v. Samuel Weiser, Inc., No. 81-0459-P (D. Me. Dec. 6, 1984).

STATUTES

17 U.S.C.S. §501(b) (Law. Co-op. 1978) provides as follows:

> §501. Infringement of Copyright
> (b) The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of sections 205(d) and 411 [17 USCS §§205(d) and 411], to institute an action for any infringement of that particular right committed while he or she is the owner of it.

17 U.S.C.S. §411(a) (Law. Co-op. 1978) provides as follows:

> §411. Registration as prerequisite to infringement suit.
> (a) Subject to the provisions of subsection (b), no action for infringement of the copyright in any work shall be instituted until registration of the copyright claim has been made in accordance with this title [17 USCS §§101 et seq.]. In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused the applicant is entitled to institute an action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights. The Register may, at his or her option, become a party to the action with respect to the issue of registrability of the copyright claim by entering an appearance within sixty days after such service, but the Register's failure to

become a party shall not deprive the court of jurisdiction to determine that issue.

17 U.S.C.S. §507(b) (Law. Co-op. 1978) provides as follows:

> § 507. Limitations on action.
> (b) Civil actions. No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued.

STATEMENT OF THE CASE

Petitioner (Motta) sued respondent publisher (Weiser) for, inter alia, infringement of copyrights in works by Aleister Crowley, a British mystic of the early twentieth century. Judge Gene Carter of the District Court, without a jury, decided the case on the issue of ownership of the copyrights, which was the principal factual issue addressed at trial. The District Court did not reach petitioner's failure to register its copyrights before filing suit, nor did it address the statute of limitations and other defenses raised below.

Motta's primary contention at trial was that he and his Tennessee non-profit corporation, the Society Ordo Templi Orientis (SOTO), owned the Crowley copyrights because 1) Crowley bequeathed them to an unincorporated association

known as the Ordo Templi Orientis (OTO), and 2) Crowley's successor as head of the OTO ("Outer Head of the Order", or OHO), Karl Germer, designated Motta to succeed him as OHO. Judge Carter rejected Motta's claim to be OHO because his documentary evidence fell far short of establishing that Germer ever so designated him, and because his testimony was unworthy of belief. (Motta v. Samuel Weiser, Inc., No. 81-0459-P, slip op. at 8-10).

Motta also contended that he and SOTO could enforce the Crowley copyrights as tenants in common with all other OTO members. The District Court rejected this contention as well. It held that in order for an unincorporated association such as the OTO to own property, including through its individual members, it must have a distinct, identifiable membership. Id. at 19. Lacking evidence enabling it "to

recognize a definite organization which has the exclusive right to use of the OTO associational name," id. at 22, the Court found that the OTO's membership could not be ascertained. The District Court noted that while neither party "expressly raise[d] in a discrete context the issue as to whether the OTO is a cognizable legal entity", id. at 25, they clearly raised the issue of ownership as an element of infringement, with capacity for ownership being an essential predicate to ownership.

On appeal Motta argued that the District Court's decision was based on an issue never raised below, and thus it violated due process under Reynolds v. Stockton, 140 U.S. 254 (1891). The Court of Appeals for the First Circuit rejected this argument, holding that the Reynolds requirement that an issue be "tendered by the pleadings" was satisfied below.

Motta v. Samuel Weiser, Inc., 768 F.2d 481, 486 (1st Cir. 1985). Judge Davis, sitting by designation, wrote that the record demonstrated that Weiser hotly contested ownership, asserted Motta's lack of standing under 17 U.S.C. §501(b), and made no admission or stipulation regarding the issue of capacity. In short, Motta simply failed to prove the ownership element of his infringement claim. The Court of Appeals also declined to address the petitoner's failure to register the copyrights, and the statute of limitations and other defenses.

SUMMARY OF ARGUMENT

The petition should be denied because the Court of Appeals properly applied the law in Reynolds v. Stockton, 140 U.S. 254 (1891), to the record before it. The Court correctly found that proof of the capacity of an unincorporated association to own property was inherent in the burden of proof of ownership of the copyrights at issue, and thus "tendered by the pleadings", when Motta's only plausible claim of such ownership was through membership in that association.

The petition should also be denied because this case does not raise an issue of sufficient importance to warrant this Court's attention. Whether the petitioner bore the burden of proof on a sub-issue concerning copyright ownership is not a substantial federal question that merits this Court's concern.

The petition should also be denied because, as to seven of the eleven copyrights at issue, petitioner failed to comply with 17 U.S.C.S. §411 (Law Co-op. 1978) by registering those copyrights prior to initiating this action. That failure deprived the District Court (and all subsequent courts) of jurisdiction.

The petition should also be denied because neither Court below addressed a number of issues, including jurisdiction and the statute of limitations, which will likely deny petitioner relief regardless of this Court's action on the question presented.

REASONS FOR DENYING THE WRIT

I. The Court of Appeals correctly applied established precedent.

The Court of Appeals correctly applied established legal precedent to the

record before it. Petitioner Motta bore the burden of proving ownership of the copyrights of Aleister Crowley as part of his infringement claim. 17 U.S.C.S. §501(b) (Law. Co-op. 1978). Respondent Weiser vehemently opposed proof of ownership. Further, Weiser asserted Motta's lack of standing under section 501(b) as an affirmative defense. Motta v. Samuel Weiser, Inc., 768 F.2d 481, 486 (1st Cir. 1985). Applying the rule in Reynolds v. Stockton, 140 U.S. 254 (1891), that an issue must be "tendered by the pleadings" to form the basis of a judgment, the Court of Appeals held that the capacity of the OTO to own property was inherent in Motta's burden of proving ownership, and that the Reynolds requirement had been satisfied. Motta, 768 F.2d at 486-87. Motta's characterization of the decision below as "overturning" Reynolds is

inaccurate. The Court of Appeals gave full consideration to the issue and correctly applied the established precedent of this Court. Reynolds, 140 U.S. 254; see United States v. Seminole Nation, 299 U.S. 417 (1937).

II. The question presented is not sufficiently important to warrant the attention of this Court.

This case raises no question, federal or otherwise, warranting the attention of this Court. Motta's contention stems from a disagreement with the District Court over the scope of his burden of proof on the ownership of copyrights. Moreover, he presents no argument questioning either lower court's view of the law controlling an unincorporated association's capacity to own. The issue for which review is sought here is whether Motta had to supply

evidence sufficient to permit a finding of such capacity as part of his burden to prove ownership, or whether the OTO's capacity had to be raised separately. The issue is simply not significant enough to merit this Court's concern.

III. The Federal Courts have never had jurisdiction as to seven of the eleven disputed copyrights.

Motta did not comply with 17 U.S.C.S. §411 by registering with the Copyright Office seven of the copyrights prior to suing for infringement. Registration is a jurisdictional prerequisite to the institution of an infringement claim. 17 U.S.C.S. §411(a) (Law Co-op. 1978); Hagendorf v. Brown, 699 F.2d 1018 (9th Cir. 1983); Burns v. Rockwood Distributing Co., 481 F. Supp. 841 (N.D. Ill. 1979); International Trade Management, Inc. v. United States, 553 F.

Supp. 402 (Ct. Cl. 1982). This Court lacks subject-matter jurisdiction as to the bulk of Motta's case, as did the courts below despite their failure to address this issue.

IV. Even if successful before this Court, Petitioner will likely fail below on remand because of unresolved issues in the record.

Neither lower court addressed several defenses which, in addition to lack of subject-matter jurisdiction, preclude relief for Motta. Paramount among these other defenses are two.

First, as a co-owner with other OTO members, Motta cannot preclude them from fully exploiting the subject-matter of the copyright. Edward B. Marks v. Jerry Vogel Music Co., 140 F.2d 266 (2d Cir. 1944). The record demonstrates that another OTO member, Grady McMurtry,

licensed Weiser to publish works of Crowley without restriction. Appendix at 678-79, Motta v. Samuel Weiser, Inc., 768 F.2d 481 (1st Cir. 1985); id. at 483, n. 4.

Second, the statute of limitations, 17 U.S.C.S. §507(b) (Law. Co-Op. 1978), requires commencement of the action within three years. Five of Motta's claims are barred completely.

CONCLUSION

The Court of Appeals properly applied established precedent to the record and correctly decided the issue before it. That issue does not in any event merit the attention of this Court. The bulk of Petitioner's case should never have been heard for lack of subject matter jurisdiction. Numerous defenses raised but not addressed below will preclude relief for petitioner even if this Court grants the petition. Respondent prays that the petition be denied.

Respectfully submitted,

By: _____

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November 22, 1985

CERTIFICATE OF SERVICE

I, James S. Erwin, hereby certify that on this 22nd day of November, 1985, I mailed first class, postage prepaid, to the Clerk's Office of the U.S. Supreme Court forty copies of this Response to Petition, and on this same day I mailed three copies by first class, postage prepaid, to Daniel B. Stone, esquire, 1700 Pennsylvania Ave, NW, Washington, DC 20006, Attorney for Petitioner.

James S. Erwin